EMPLOYMENT TRIBUNALS

Claimant: Ms M Gorzynska

First Respondent: Stainless Band Limited
Second Respondent: Mr J Hanson

Heard at: Leeds **On:** 6 and 7 March 2019
4 April 2019 (reserved decision)

Before: Employment Judge Licorish
Ms H Brown
Mr J Rhodes

Representation
Claimant: in person
Respondent: Mr J Robinson, Solicitor

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claimant's complaint of constructive unfair dismissal against the first respondent succeeds.

2. The claimant's compensation for unfair dismissal should not be limited or otherwise reduced on the basis that she would have been fairly dismissed in any event at some point in the future.

3. The claimant's complaint of harassment related to sex succeeds in respect of inappropriate comments made by the second respondent about the claimant's personal life, and the timing of and manner in which permission to take parental leave was withdrawn in around May 2018.

4. The remainder of the claimant's complaint of harassment related to sex fails and is dismissed.

5. The claimant's complaint of direct sex discrimination fails and is dismissed.

6. The claimant's complaint of indirect sex discrimination fails and is dismissed.

7. If the parties are unable to agree the amount of compensation to be paid to the claimant, within 28 days of the date that this Judgment is sent to them, they should send to the Tribunal dates on which they would be <u>un</u>able to attend a further hearing in the following six months, a time estimate for that hearing and a draft list of issues to be determined by the Tribunal. A further hearing to decide compensation will be listed in due course.

REASONS

1. The claimant started to work for the first respondent limited company in April 2012. The second respondent is the first respondent's managing director and principal owner. By a claim form presented on 16 August 2018, following a period of early conciliation from 23 June to 23 July 2018, she complains of constructive unfair dismissal, harassment related to sex, and direct and indirect sex discrimination.
2. The respondents deny the claimant's claim. Most importantly, their position is that the claimant was not dismissed and/or discriminated against as alleged and chose to resign to avoid an inevitable disciplinary investigation.

The hearing

3. During the hearing the Tribunal first heard evidence from the claimant, Juanita Woodward (a former colleague) and Marek Wielgo (the claimant's partner). For the respondent we heard from Andrea Olsson (commercial manager) and the second respondent, Jonathan Hanson. For clarity, we will refer to Mr Hanson by name in these Reasons.
4. The claimant also submitted an anonymous witness statement from another former colleague. Unfortunately, that witness was not prepared to be identified and accordingly did not attend the hearing. In the circumstances, we explained to the parties that we could attach very little weight to that statement, in view of the fact that the witness was unable to confirm under oath the accuracy of her or his evidence, nor was s/he available to be cross-examined by the respondent or questioned by the Tribunal.
5. All the witnesses' written statements were read by the Tribunal before the claimant gave evidence.
6. The Tribunal was also provided with an agreed bundle of documents, initially comprising 165 pages. At the beginning of the hearing, unsigned "*to whom it may concern*" character references provided by another two of the claimant's former colleagues and dated June 2018 were added to the bundle at pages 166 and 167 by consent, on the basis that the respondents were given permission to ask questions of all of the witnesses relating to those documents. The Tribunal further explained in any event that if those documents were disputed, they could be of limited assistance if the writers were not giving evidence.
7. The respondents' representative thereafter proceeded to cross-examine the claimant on the basis that the dates on the letters in question had been altered. The claimant immediately offered to forward to the Tribunal the emails she had received from her former colleagues attaching the references, which she did during the lunch break on the first day of the hearing. Those emails (also dated June 2018) were accordingly added to the bundle by consent at pages 166A

and 167A. The respondents' representative once more proceeded to question the claimant regarding "*concerns about the veracity of those documents*", including the dates on the emails. No additional evidence was obtained from the respondents' witnesses in this respect. In the circumstances, and in view of the claimant's readiness to forward the said emails to the Tribunal at short notice, the Tribunal is not persuaded that the claimant's evidence or credibility generally should be doubted on that basis.

8. It was explained to the parties that the Tribunal would read all of the documents referred to in the witnesses' written statements, the pleadings and those documents brought to our attention during oral evidence and submissions. References to page numbers in these Reasons refer to those documents in the complete bundle before the Tribunal.

9. Submissions from both parties concluded sufficiently late on the final day of the hearing with the effect that the Tribunal reserved its decision.

The issues

10. The issues in respect of the claimant's claim were first identified during a preliminary hearing on 13 December 2018 (pages 28 to 30). That list was clarified and agreed at the beginning of the hearing.

11. The issues to be determined by the Tribunal are:

Constructive unfair dismissal

11.1 Has the claimant proved, on the balance of probabilities, that the first respondent fundamentally breached an express or implied term in her contract of employment? The claimant relies on the following alleged acts by Jonathan Hanson:

11.1.1 Bullying her, shouting at her, threatening her job security, threatening to demote her and/or make her redundant if she did not forgo booked parental leave in June 2018.

11.1.2 Withdrawing permission to take parental leave in June 2018 at unreasonably short notice and in an unacceptable manner.

11.1.3 Making inappropriate comments about the claimant's personal life, including comparing the claimant to his own wife who, he said, worked full time but never took parental leave.

11.1.4 Making unfair criticisms of the claimant to the effect that she was not pulling her own weight by not taking enough work home to do outside of her contractual hours and without pay.

11.2 Did the first respondent without reasonable and proper cause thereby act in a way calculated or likely to destroy or seriously damage the implied term of mutual trust and confidence?

11.3 If so, did the claimant affirm her contract of employment by delaying too long in resigning?

11.4 If not, was the fundamental breach of contract an effective reason for the claimant resignation?

11.5 If the claimant was constructively dismissed, the first respondent does not put forward any potentially fair reason for its conduct, in which case her complaint will succeed.

11.6 Has the first respondent shown that the claimant would have been fairly dismissed at some point in the future for a reason related to her capability or conduct?

Harassment related to sex

11.7 Did the second respondent engage in unwanted conduct, as alleged at paragraphs 11.1.1 to 11.1.4 above?

11.8 If so, did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of violating the claimant's dignity or creating an intimidating, hostile grading, humiliating or offensive environment for the claimant?

11.9 If so, was that conduct related to the claimant's sex?

Direct sex discrimination

11.10 Has the first and/or second respondent subjected the claimant to any treatment falling within section 39(2)(d) of the Equality Act 2010 (EqA) not found to have been harassment?

11.11 If so, has the first and/or second respondent treated the claimant less favourably than it treated or would have treated comparators? The claimant relies hypothetical comparators based on the way in which male employees were treated in the workplace.

11.12 If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of sex?

11.13 If so, what is the first and/or second respondents' explanation? Do they prove a non-discriminatory reason for any proven treatment?

Indirect sex discrimination

11.14 Did the first respondent apply a provision, criteria and/or practice (PCP) generally, namely that employees forgo parental leave at short notice if the first respondent required it?

11.15 Did the application of the PCP put female employees at a particular disadvantage compared with male employees? The claimant argues that female employees are more likely to have primary childcare responsibilities.

11.16 Did the application of the PCP put the claimant at that disadvantage?

11.17 If so, has the first respondent shown that the treatment was a proportionate means of achieving a legitimate aim? The first respondent's stated defence is that the claimant was required to attend work owing to the consequences of a "*serious theft and fraud investigation she was required to assist with*" (page 23).

Factual background

12. Having considered all of the evidence, the Tribunal makes the following findings of fact, on the balance of probabilities, which are relevant to the issues to be determined. Some of our findings are also contained in our later Conclusion to avoid unnecessary repetition.

13. The claimant started to work for the first respondent limited company as an office administrator on 23 April 2012. The first respondent currently employs 32 people at its main site in Bingley and a sales office in Staffordshire. It

specialises in stainless steel coil processing, and covers a variety of sectors including the automotive, oil and gas, petrochemical, electronic and pharmaceutical industries in the UK and internationally.

14. Jonathan Hanson is the first respondent's managing director and principal owner. Throughout her employment, the claimant reported directly to Mr Hanson. In November 2012, her job title became stock controller and administrator (page 46A).

15. The first respondent has an Employee Handbook dated April 2012 (the Handbook). Contained within the Handbook is a parental leave policy (page 36). Among other things, it states that eligible employees must give at least 21 days' notice of any request to take parental leave, and: "*Permission for parental leave may be postponed by the Company, for up to 6 months, where the business may be unduly disrupted*."

16. During the hearing an extract from the Maternity and Parental Leave Regulations 1999 was added to the bundle at the Tribunal's suggestion (the Regulations, at pages 36A and 36B). Schedule 2 of the Regulations sets out a default scheme which will apply in the absence of any other individual or collective agreement. According to paragraph 6(d), an employer may postpone a period of parental leave on the grounds set out in the first respondent's policy, but also must give notice in writing of the postponement no more than 7 days after the employee's notice was given. The notice must also state the reason for the postponement and specify the date(s) on which the postponed leave will begin.

17. The Handbook also contains a disciplinary policy (pages 37 to 40) and bribery policy (page 41), which we refer to later.

18. The claimant has a young son who is currently of primary school age. In September 2014 the claimant made and was granted a three-month flexible working arrangement to accommodate the closure of her son's nursery (pages 47 to 48). Minutes of the meeting to discuss her application confirm that at that time the claimant could access the first respondent's server from her personal laptop and thereby work from home (page 47A). During cross-examination, the claimant stated (and the Tribunal accepts) that she was issued with a work laptop at around this time.

19. The claimant continued to progress in her employment, and in around March 2015 she became inventory, purchasing and logistics manager. As a result, the claimant was given additional duties in purchasing and line-managed the office administrator. At the same time, she also requested and was given a pay rise, and her duties included managing stock checks (pages 49 to 52). Her revised terms and conditions of employment also state that the Handbook does not form part of her contract of employment (page 57).

20. In October 2017, the claimant was promoted to general manager and given additional responsibilities described as "*assistance for accounts department as required and new sales, identifying and contacting. You will also continue to mentor and train your team and the new replacement*" (page 59). The claimant was based on the floor below Jonathan Hanson in what is known as the operations office.

21. Juanita Woodward worked for the first respondent as a marketing manager from May until around October 2017, also reporting directly to Jonathan Hanson. During her employment, specifically she says that she witnessed Mr Hanson shouting at the claimant and humiliating her in front of the rest of the

office on a number of occasions. Nevertheless, she says that the claimant kept her composure. Ms Woodward also worked next to Mr Hanson's office. During meetings with the claimant, she heard Mr Hanson "*shouting at the top of his voice*". The claimant would emerge from those meetings looking as though she was about to cry and, on some occasions, left in tears.

22. In further information provided by the claimant during these proceedings, when asked to describe Jonathan Hanson's alleged behaviour generally, she stated that Mr Hanson would raise his voice, shout and swear, and make inappropriate comments. For example, Mr Hanson would suggest, on one occasion in front of a member of her team, that the claimant (who is Polish) "*needed a translation*" if it appeared that she did not understand what he was saying to her (page 26).

23. Generally, Juanita Woodward says that Jonathan Hanson thrived on undermining his staff, often in front of others. He would swear at and humiliate other employees, and once told a male colleague: "*If you can't do your fucking job properly then fuck off*." She says that "*everyone … was on edge*" when Mr Hanson was at the Bingley site.

24. More specifically, Juanita Woodward says that Jonathan Hanson also became irritated by her difficulty in understanding verbal instructions even though she had explained the underlying reason. A few weeks before she left the first respondent's employment, she says that she reminded Mr Hanson that she had a diagnosed condition of auditory sequencing linked to dyslexia. Mr Hanson replied: "*We are a very busy company, we don't have time for that.*"

25. Juanita Woodward was made redundant with immediate effect in around October 2017. She was informed and escorted off the premises by the claimant. A subsequent grievance citing disability discrimination was dismissed by Jonathan Hanson in December 2017 (page 59A).

26. In cross-examination, it was suggested to Juanita Woodward that she had been "*friendly*" with the claimant during her employment and had obviously kept in touch since. However, Ms Woodward explained that while working for the first respondent she did not get to know the claimant at all well, had not kept in touch because the claimant had "*sacked*" her (although she appreciated that the decision had been Jonathan Hanson's), and had chosen to give evidence simply because the claimant had asked her to describe what she had witnessed. Ms Woodward further explained that at the outset of her employment she did not disclose her condition as a "*health issue*" because she thought that a "*learning disability*" did not fall under that category (page 53A). She also approached Mr Hanson subsequent to her employment on an apparently friendly basis because he was unpredictable (that is to say, civil on certain days but not on others) and wanted to "*keep in to get a reference*" (pages 151 to 153).

27. The Tribunal found Juanita Woodward to be a straightforward and credible witness. In particular, she maintained her position during her evidence, did not depart from it in any way, and gave logical answers to any challenges to her evidence during cross-examination. We therefore accept her and the claimant's evidence as to the general behaviour of Jonathan Hanson towards his staff. Put simply, he was short-tempered, changeable and prone to highlight or dismiss any vulnerabilities within his staff. The Tribunal further comments on the evidence of the claimant and the respondents' witnesses in more detail below.

28. In January 2018, Andrea Olsson joined the first respondent as commercial manager. She shared an office with Jonathan Hanson. As at this time, the claimant was entitled to 28 days' annual leave per year. However, she was obliged to take 12 days at fixed times (comprising bank holidays and a six-day compulsory closure from 24 to 31 December inclusive). In terms of her remaining 16 days holiday, in January 2018 she requested and was granted 6 days from 10 to 17 May inclusive, and 10 days in August 2018 (pages 60 to 61).

29. By letter dated 11 January 2018, the claimant further requested and was granted two separate weeks of unpaid parental leave in April and June in order to look after her son during his Easter and half-term school holidays (pages 62 and 64A). Jonathan Hanson's evidence was that he thought that the claimant went away in April 2018. However, although the claimant took some parental leave at that time, the documents show that she in fact worked for two days from home and visited the office on the Tuesday of that week to check that everything was running smoothly, and was accordingly paid on that basis (page 66a).

30. On the claimant's return from parental leave on around 13 April 2018, Jonathan Hanson brought to her attention that she and her team had been using a 2015 rather than 2016 version of the first respondent's term and conditions of sale. When the claimant was asked to explain the reason for this and what measures she would put in place in the future, she replied by email on 16 April: "*I will not be using excuses why we use the old terms and conditions. This is what I have saved on my desktop and what was available on our server … For the future if any documents/forms/applications [the first respondent] is using will be updated on our server straight away and copy will be emailed to every office employee*" (quoted as written, pages 67 to 68).

31. Jonathan Hanson says that by this email the claimant acknowledges that she had "*lied*" to him. However, the claimant explained in cross-examination (and the Tribunal accepts) that at the time she was simply unable to explain what had happened (hence the "*no excuses*"), and accordingly set out the safeguards she intended to implement for the future.

32. As part of its business, the first respondent relies upon invoice financing and as at 2018 banked with HSBC for this purpose. Jonathan Hanson says that he was unaware that in January 2018 and at the request of the first respondent's finance manager, HSBC had increased its invoice financing limit to £2.5 million. The finance manager also directly reported to Mr Hanson.

33. On 16 April 2018 HSBC carried out a routine audit of the first respondent's invoice finance. Among other things, the audit revealed that the first respondent's creditors were being paid much earlier than market standards. Jonathan Hanson explained that at the time the first respondent was shown to have creditors amounting to £720,000, debtors of £1.9 million and £1.6 million worth of stock. The audit revealed that its creditors in fact totalled £761,000 representing 150% of the first respondent's ledger. Under normal trading conditions, the figure should have been 90% of its debtor book.

34. The Tribunal accepts that this development came has a considerable shock to Jonathan Hanson and seriously threatened the survival of the first respondent's business. Mr Hanson explained that the first respondent's bank account was frozen, and the finance manager shortly thereafter admitted fraud and deliberate falsification of records. As owner, Mr Hanson was also required to

provide a personal surety to enable the first respondent to continue to pay its staff.

35. From 24 April 2018, KPMG was also appointed by HSBC to undertake an independent review of the first respondent's business and to assist it in paying down its debt over a fixed period (pages 70D to 70AF). KPMG proposed to provide its report by 11 May (page 70F), although the final report was published on 24 May 2018 (pages 82A to 82 AE). The scope of work was stated to include a review of the first respondent's balance sheet and working capital position (including a '*high level review of the first respondent's stock position, including sample checks of stock held*" (pages 70K to 70L). Jonathan Hanson explained that, in the event, the first respondent was able to clear its debt within 6 weeks.

36. On 26 April 2018, Jonathan Hanson asked the claimant to attend a meeting with the finance manager in order to take notes. In cross-examination, Mr Hanson was questioned on the basis that, although she was general manager, the claimant was not told in advance what the meeting was about. Mr Hanson replied that he assumed that he would have told the claimant beforehand, but he could not remember if he did so. In the event, it was a very short meeting during which the finance manager was dismissed with immediate effect for "*fraud or deliberate falsification of records, a number of acts of dishonesty and a serious breach of trust and confidence*" (page 68A). His dismissal for gross misconduct was subsequently confirmed by letter (page 68B).

37. By email on 27 April 2018, the claimant asked Jonathan Hanson whether she could discuss with him the impending general data protection regulations. Mr Hanson replied: "*Please concentrate on what we have discussed today on your department and purchasing, this is totally irrelevant at this time … My concern … is that you now remain calm at this time and it's not what I need. Please focus*" (page 68C). In response to the Tribunal's questions, Mr Hanson said that this email showed that "*there were holes in what [the claimant] was doing*".

38. On 30 April 2018, one of two interim financial directors started to work for the first respondent and currently remains in that role.

39. By email on 3 May 2018, Jonathan Hanson asked the clamant to "*monitor purchasing*" in response to her sending him a copy of the April month-end figure for "*consumables*". His request was made on the basis that he considered the £14,000 total to be "*large*" (page 70A).

40. By email also on 3 May 2018, the claimant told Jonathan Hanson to "*please be advised*" that three recent recruits had passed their probation period (page 71). Because the claimant and two other employees had recommended them, she also told Mr Hanson to "*please be advised*" that they were accordingly each entitled to receive £250 under the first respondent's referral bonus scheme. In his evidence, Mr Hanson says that this email shows that the claimant was "*unethical*" because she failed to update the salary details of the probationary employees but ensured that she received the referral payment. In response to the Tribunal's questions, however, the claimant explained that by that email she was so advising that the employees' salary details needed to be updated, as well as the fact that she and others were due a bonus. This is indeed borne out by the same terminology she uses in respect of both matters. In the absence of any other evidence, the Tribunal is not therefore persuaded that the claimant was acting unethically in this respect.

41. In the meantime, Jonathan Hanson explained that HSBC had put the first respondent into "*special measures*" and indicated that it intended to withdraw

its banking services, as a result of which the first respondent needed to secure alternative financing. By email on 4 May 2018, Jonathan Hanson was informed by its chosen prospective banker Barclays that an auditor would visit the first respondent from 21 to 23 May 2018 inclusive "*to review procedures and records*". During the visit, Barclays explained, it would require specific information including the first respondent's "*most recent stock check*". In addition, it explained "*a physical stock-take of certain product lines will take place during the course of the visit, during which we will need accompanying by you or a member of staff*" (emphasis added, pages 70B to 70C). Mr Hanson confirmed in response to the Tribunal's questions that this particular exercise comprised a selective but not full check of the first respondent's stock, and review of its existing stock check to the end of April 2018.

42. Also on Friday 4 May 2018, the claimant says that Jonathan Hanson called her into the boardroom to discuss her impending annual and parental leave. She recalls that Andrea Olsson was also present. Mr Hanson asked the claimant why she needed to take time off. She replied that she had booked her annual leave to attend her godson's first holy communion in Poland, and had otherwise made commitments to spend time with her son during the half-term holiday. She also reminded Mr Hanson that during part of her parental leave in April she had in fact worked from home on certain days and had come into work. She also said that she had made sure to book her leave at the beginning of the year "*to avoid any problems*".

43. The claimant says that Jonathan Hanson thereafter became aggressive and raised his voice. He shouted at her on the basis that if she did not change her plans and come into work in June her role would have to be changed as she did not seem to appreciate her position. The claimant protested and reiterated her commitment, but Mr Hanson asked again whether she was going to come into work. She again replied that she "*would if she could*" but had made plans which she could not now change. She was eventually allowed to go back to her office, but the claimant says that she felt very upset and humiliated. It appeared to her that Mr Hanson had been "*showing off*" in front of Ms Olsson in order to demonstrate how powerful he was.

44. The claimant says that Jonathan Hanson later went down to the operations office and asked to speak to her. In private he then apologised, stating that he had not meant to threaten her, her job would remain unchanged and he had "*no issues*" with the claimant taking her parental leave in June.

45. The claimant also says that during the following week Andrea Olsson told her that Jonathan Hanson's behaviour had been "*totally unacceptable*" and that Ms Olsson had told him that "*he was totally out of order*". The claimant explained that Mr Hanson had in fact subsequently apologised and he had agreed that she could take her parental leave as planned.

46. Although the claimant was cross-examined on the basis that she had been mistaken, no such meeting took place on 4 May 2018 and the respondents' witnesses would say otherwise, in fact neither of those witnesses addressed that specific contention in their statements. At this point, the Tribunal notes that in her letter of resignation the claimant sets out the events leading up to her decision (quoted at paragraph 72 below). In summary she says that "*before*" 18 May 2018, but on an unspecified date, Jonathan Hanson tried to cancel her parental leave and behaved badly towards her. Later that same day, he apologised for his behaviour and confirmed that she could indeed take the time off. In her subsequent grievance (cited in paragraph 75 below), the claimant

specified that those earlier conversations took place on 4 May 2018. In response to a request for further information as part of these proceedings as to when the "*alleged unacceptable behaviour*" about which she complains occurred, she replied "*in the meetings on 04/05/18 and 18/05/18*" (page 25).

47. Generally, in her written evidence Andrea Olsson says that at no point did she witness any rude, intimidating or bullying behaviour from Jonathan Hanson. Nevertheless, she acknowledges that around this time Mr Hanson was "*more stressed than usual*" owing to the actions of the former finance manager.

48. More specifically, in response to the Tribunal's questions, Andrea Olsson confirmed that Jonathan Hanson told her that he was going to meet with the claimant on 4 May 2018. However, she stated to the Tribunal: "*I do not believe that I was present*." She also denied having any subsequent conversation with the claimant during the following week about Mr Hanson's alleged behaviour.

49. During re-examination, when asked why the claimant would suggest that she was at the meeting, Ms Olsson also said that she presumed that the claimant "*wanted another witness in the room*".

50. In response to the Tribunal's questions, Jonathan Hanson confirmed that he did in fact meet the claimant on 4 May 2018. However, he said that it was a "*normal Friday meeting*" involving "*general updates*". He otherwise denied the claimant's version of events.

51. On balance, we prefer the claimant's version of events for the following reasons. Generally, we found the claimant to be a consistent and credible witness. Her account was also supported by contemporaneous documents. The Tribunal further takes into account the oral evidence of both of the respondents' witnesses, which was at odds with the way in which the claimant had been cross-examined about her version of events on 4 May 2018. The Tribunal also notes that Jonathan Hanson did not address the specific allegation about his behaviour on 4 May 2018 and subsequent apology, in view of the fact that that was a matter in clear dispute before his written statement was prepared.

52. The claimant's evidence was further consistent to the extent that Andrea Olsson was present during the meeting on 4 May but not on 18 May 2018 (we go into more detail about the witnesses' accounts of the latter meeting below). Most importantly, we take into account Ms Olsson's suggestion as to why the claimant would say that she was at the earlier meeting but not at the latter (which Ms Olsson says did attend). First, if as Ms Olsson suggested the claimant "*wanted a witness in the room*", that would make sense only if the claimant assumed that she would be able to rely on such a witness to corroborate her version of events. Secondly, the claimant maintains that she was subjected to similar treatment during the latter meeting but insists that she met Mr Hanson on his own. It therefore appears illogical to the Tribunal that the claimant would invent the attendance of a witness who would therefore be unlikely to support her account, but remove the same witness from a second meeting on a similar basis.

53. On 8 May 2018 the first respondent received a reminder for an unpaid March invoice in the sum of just over £1,150 from one its suppliers, Lyreco (pages 64E to 64F, and 71A to 71B). In response to his query, the claimant explained to Jonathan Hanson that the first respondent used Lyreco for personal protective equipment (including gloves, ear plugs and "*hi vis*"), some stationery, office furniture, plus cleaning products, toilet paper and hand towels.

54. By email on 9 May 2018, prior to going on holiday the claimant sent to Jonathan Hanson a list entitled "*workload*" (page 72). The Tribunal accepts that this was effectively a "to do" list and that was all that was required of her at this time. This is because she later states in her email that if anything changed "*during the day*" she would let Mr Hanson know. Andrea Olsson, however, suggested during her evidence this was supposed to be a comprehensive list of the claimant's duties. However, Mr Hanson described it in his statement as a list of "*outstanding tasks*".

55. The claimant thereafter went on holiday from 10 to 17 May 2018 inclusive. While she was away and by email on 16 May 2018, Jonathan Hanson emailed the claimant stating: "*This list is really incomplete, can we run through 9AM Friday*?" When the Tribunal asked Mr Hanson why he had come to that conclusion, he said that it was because he "*thought other things should have been going on*".

56. In the response to the claimant claim the first respondent states that on 11 May 2018 the claimant agreed with Jonathan Hanson that she had failed to progress the sales side of her job (paragraph 2.4, page 21). In his evidence, as well as in his response to the claimant's later grievance (paragraph 77 below), Jonathan Hanson maintained that he met with the claimant on 11 May 2018 in this respect. In cross-examination, he suggested that this meeting would have taken place either in his office or the boardroom. Nevertheless, he thereafter acknowledged that such a meeting could not have happened on that day because the claimant was away on annual leave. In response to the Tribunal's questions, Mr Hanson said that the meeting "*would have been just before*" the claimant went away.

57. The Tribunal also had before it an unsigned draft letter to the claimant dated 18 May 2018 (page 72B). The letter is stated to be an invitation to an investigation meeting in the first respondent's boardroom with Jonathan Hanson and Andrea Olsson to discuss her "*management of purchasing and [a customer account]*". Mr Hanson told the Tribunal that he did not suspect the claimant of "*fraud*" at this time, but simply wanted the claimant *"to step up to the plate"*. He did not send the letter because he decided to give the claimant *"the benefit of the doubt"*. Andrea Olsson told the Tribunal that she believed the letter was not sent to the claimant because Mr Hanson had to deal with "*more pressing matters*".

58. The claimant returned from holiday on Friday 18 May 2018. She says that before she was able to turn on her computer, she was told by a colleague that Jonathan Hanson wanted to see her in the boardroom. That colleague also told her: "*Jonathan is not normal … while [she] was on holiday he was picking on everyone. He was looking and digging for mistakes.*" The new transport administrator also described Mr Hanson as a "*psycho*".

59. It appears (according to the claimant's handwritten note dated 18 May 2018) that when she went to the boardroom there was a general discussion about the claimant's responsibilities (page 73). Among other things, she noted that in future Jonathan Hanson was to sign all purchase orders for consumables and she was to prepare a list of her "*range of duties*". In cross-examination the claimant said that Mr Hanson did not say that this was because he was concerned about the way in which she had been doing her job. Mr Hanson's initial evidence was that he "*express[ed] disappointment with [the claimant's] performance*". However, in response to the Tribunal's questions, Mr Hanson stated that the meeting was "*collegiate*", he neither suggested to the claimant

that she would be subject to any "*performance management*", nor did he set any future expectations regarding standards of work. When he was later redirected back to his original evidence, however, he maintained that he did raise the general issue of the claimant's performance.

60. The claimant also maintained (as she did in the further information she provided in the course of these proceedings – page 25) that she met Jonathan Hanson on his own. She also stated in cross-examination that the main discussion during their meeting was to do with her impending parental leave.

61. In her witness statement, Andrea Olsson's stated that she was there for "*part of the meeting … [which] was amicable and professional*". The claimant was also cross-examined on the basis that Ms Olsson was there for "*at least half of the meeting*". In response to the Tribunal's questions, Ms Olsson said that she happened to be working in the boardroom (rather than the office she shared with Mr Hanson) but did not participate in the meeting. She estimated that it lasted for about half an hour, and involved a discussion about the claimant's workload and "*whether she was able to attend the audit and stock take*". She says that she was also present when a letter was handed to the claimant. In the event, in response to the Tribunal's questions Ms Olsson then confirmed that she had witnessed the majority of the meeting but "*may have popped out to speak to the production manager or another member of my team*".

62. In his witness statement, Jonathan Hanson does not refer to Andrea Olsson's presence during that meeting at all. However, in response to the Tribunal's questions, he stated that she was there, he could not remember for how long, but recalls that she was "*dipping in and out"*.

63. During the meeting, it is not disputed that Jonathan Hanson handed the claimant the following letter (page 74):

    "*Following your request for parental leave and subsequent discussions I confirm that the request for leave 4th – 8th June is no longer possible due to a dramatic change in company circumstances.*

    Following the dismissal of [the finance manager] various issues of fraud have come to light for our finance partners HSBC and accountants. This means [the first respondent] <u>is now involved in a rigorous audit of all company finances and processes which being general manager you are overseeing such as purchasing and stock control</u>. Attached is an extract from our handbook confirming the company's right to withdraw such leave.

    If you can confirm within 2 days of this letter as I need ensure your availability. (emphasis added)."

64. The claimant says that she protested, based on their conversations before her holiday, but Jonathan Hanson insisted that he needed her assistance regarding an "*audit from [the] bank*". In further information she provided, she says Mr Hanson added: "<u>*because of all problem caused by [finance manager] I need to be on site and help*</u>" (quoted as written but emphasis added, page 25). The claimant told Mr Hanson that there were a number of her colleagues in operations who would be able to assist in her absence. He then raised his voice and was "*very rude*" in his tone, stating that she did not appreciate her job or position within the company, others were more committed, and he had noticed that she no longer sent emails outside office hours. He further stated that if he had to make anyone redundant, she would be "*the easiest one to get rid of*". He also questioned why the claimant needed to take parental leave. Mr Hanson said that he knew the claimant was a mother and had a child, but he

had children too and his wife had never had to take parental leave even though she had always worked (page 25). Mr Hanson ended the conversation by asking the claimant to "*have a think over the weekend about what I have said and let me know on Monday your answer*".

65. During the hearing the claimant was cross-examined in relation to this last comment on the basis that a decision as to whether she could take her parental leave was yet to be made. However, in response to the Tribunal's questions, the claimant confirmed that she understood that she was to think about whether she was going to attend work during the first week of June 2018, even though she had already said that she could not. Jonathan Hanson and Andrea Olsson also both gave evidence on the basis that a decision had been taken before the meeting to cancel the claimant's parental leave and the letter was given to her on this basis. Mr Hanson further stated to the claimant that if she insisted on taking the time off, he would treat her absence as unauthorised. The first respondent's disciplinary policy states that such absences are classed as misconduct (page 39). However, Mr Hanson stated to the Tribunal that unauthorised absence was "*not something we would view as a disciplinary process*". Jonathan Hanson otherwise denies that he behaved improperly towards the claimant.

66. In all the circumstances, we prefer the claimant's version of events relating to the meeting of 18 May 2018 for primarily for the same reasons set out at paragraphs 27, 51 and 52 above. Most importantly, the claimant's account of this meeting has been consistent throughout. By contrast, we were not persuaded by the respondents' witnesses' inconsistent account about whether Andrea Olsson was at that meeting and, if so, for how long. In addition, the respondents' grounds of response (paragraphs 2.12 to 2.13, pages 21 to 22) and Mr Hanson's statement made in June 2018 in answer to the claimant's grievance (quoted at paragraph 77 below) do not refer to the fact that Ms Olsson was present. Finally, as we explain later Ms Olsson assumed responsibility for investigating the claimant's subsequent grievance. In her decision letter she does not suggest to the claimant she had witnessed and therefore formed her own opinion of that meeting. In response to the Tribunal's questions, Ms Olsson also rather unconvincingly stated that it did not occur to her that there would be any conflict of interest involved in investigating allegations which she had supposedly witnessed.

67. Following the meeting, the claimant returned to work and left site at 1:00pm, which was the first respondent's usual Friday office closure time.

68. Over the following weekend, Jonathan Hanson saw copies of recent company credit card statements (pages 82AG to 82AQ). In evidence Mr Hanson said that the claimant and former finance manager both had authority to use the card, and the claimant was cross-examined on that basis. The claimant also explained to the Tribunal that although the statements were addressed to her, they were opened and passed for payment by the accounts department.

69. On Saturday 19 May 2018, Jonathan Hanson sent a WhatsApp message to the claimant asking whether she had ever used the company credit card to buy petrol, adding: "*Sorry to ask but it's on the statement and you and [the finance manager] had access*." The claimant replied that she had not, but the first respondent's CCTV camera should be able to confirm who had left its premises at around the time the card was used. She also suggested that there were likely to be security cameras at the petrol station (page 75).

70. In his written evidence, Jonathan Hanson stated that he thereafter simply cancelled the credit card on the basis that the claimant and finance manager both denied that they had used it for unauthorised purposes. However, in response to the Tribunal's questions Mr Hanson confirmed that he did in fact review the CCTV footage which showed the finance manager leaving the first respondent's premises in his car at around the relevant time. He also stated that he was "*relieved*" about this discovery. In cross-examination, Mr Hanson explained that he also discovered that the finance manager had been submitting and paying himself unauthorised mileage expenses on the basis that the finance manager "*controlled payroll*".

71. On Sunday 20 May 2018, by email Jonathan Hanson asked the first respondent's transport administrator (among other things) to review its use of purchase orders, its transport log and a particular account "*[which] is a mess*", and report back directly to himself or Andrea Olsson. Mr Hanson also asked the transport administrator on a confidential basis "*to consider taking over all purchasing and for you to work closely with accounts*" (page 76A).

72. By email at 8.30am on Monday 21 May 2018, the claimant terminated her employment with immediate effect (pages 78 to 79). In that letter the claimant gave an account of the events which she says prompted her resignation (quoted as written):

    "*I feel that I am left with no choice but to resign in light of how I have been treated recently. Again I have faced unacceptable behaviour from your side, bullying and threatening.*

    On the beginning of this year I have applied for parental leave. Request was approved and signed by yourself. Now you have changed your mind and informed me that you are rejecting my Parental Leave request. The way how you have informed me and talked to me, was completely unacceptable.

    I have explained to you, that after parental leave was approved and signed by you, I made plans and commitments I cannot change. Answer I have received was very intimidating. I have been threaten that if I will not change plans and not be in work, my position will have to be changed, as I am not appreciating the position I held. After 6 years of my loyal and professional service I do not deserve to be treated this way.

    The same day after meeting I have been called out into the conversation with you, where you have apologised and explained that you didn't mean to threaten me and everything will stay as it is, there will not be any changes of my position and it's ok for me to have parental leave in June.

    On Friday 18th you handed me your letter declining my parental leave in June. I have found this action very unfair, especially when we had this discussion before. Again I have faced bullying and threatening from your side. You've picked on me that I am not working from home after work and made inappropriate comment about my private life which I have found very rude.

    That kind of behaviour like threatening bullying is consider to be a fundamental/unreasonable breach of contract on your part. …

    Moreover my unpaid week of Parental leave won't change company fraud problems caused by Accounts …"

73. Jonathan Hanson replied by email just after 9.00am stating: "*we cannot accept your resignation on this basis and I suggest we put you on garden leave pending a meeting to discuss your grievances fully*" (page 78). On the same

day, the claimant therefore went to her GP and was signed off work for 4 weeks owing to "*stress at work*" (page 77). Jonathan Hanson later acknowledged receipt of the fit note (page 78A). In evidence, Mr Hanson stated that he was confused by claimant's actions in this respect, but the Tribunal accepts that any such confusion was caused by the first respondent in refusing to accept the claimant's resignation. In any event, by two letters dated 23 May 2018 Mr Hanson explained to the claimant that he had received legal advice to the effect that the first respondent had been bound to accept the claimant's resignation as at 21 May 2018. Mr Hanson also told the claimant that she had been "*a trusted and valued member of staff*" (pages 80 to 81).

74. On 24 May 2018, Jonathan Hanson was advised that from 1 August 2017, the former finance manager (when he was the sole employee within accounts) had raised false purchase orders in the sum of £24,500. They appeared to come from existing suppliers, but the payment details matched the finance manager's personal bank account (page 82AF).

75. By email and letter on 30 May 2018, the claimant submitted a formal grievance (pages 82 and 83). Among other things, the claimant confirmed that her allegations related to Jonathan Hanson's conduct on 4 and 18 May 2018, and that on the latter date he had also told her that she would be the "*easiest to be made redundant*".

76. By letter on 7 June 2018, Andrea Olsson dismissed the claimant's grievance (pages 89 to 92). This was stated to be because "*having taken a statement (see attached) from Jonathan Hanson I am satisfied that the allegations you have made are untrue*". Ms Olsson confirmed to the Tribunal that the entirety of her investigation comprised taking a statement from Mr Hanson.

77. In the statement that was sent to the claimant, most importantly Jonathan Hanson says that she "*is likely to be the subject of a criminal investigation*" and that she resigned "*knowing she was about to be discovered*" (pages 90 to 92). In summary, he also stated the following:

77.1 He maintains that he had a meeting with the claimant on 11 May 2018 (that is to say, while she away on annual leave) about her alleged poor performance in generating new sales.

77.2 The claimant had demonstrated a "*flagrant disregard*" for company procedures relating to invoicing, purchasing, company expenditure and audit trails.

77.3 The first respondent's transport log had not been completed since October 2017, and some suppliers had been used despite the availability of cheaper alternatives.

77.4 The claimant allowed the finance manager to pay invoices without checks or authorisation.

77.5 In April 2018, the claimant lied to Mr Hanson about never having seen the first respondent's 2016 terms and conditions.

77.6 In May 2018, the claimant failed to update the salary details of the three employees who had passed their probation period.

77.7 He withdrew the claimant's parental leave "*because of the numerous performance issues*" that he had discovered, and the discovery of theft and fraud.

77.8 The claimant was needed to assist with an audit and ongoing checks by HSBC and "*Barclays who required an urgent stock check*".

77.9 The claimant and finance manager both denied using the company credit card for their own purchases, hence it was cancelled.

77.10 The claimant must have anticipated that owing to the ongoing investigations there would be serious repercussions for her. She appeared to have deleted all emails to suppliers before she resigned which the first respondent "*can and will recover … of course*".

77.11 The claimant had accepted a blender worth £55 from a supplier (in breach of the first respondent's bribery policy) by ordering "*extra material*".

77.12 The claimant was told on 18 May 2018 that all general purchasing, supplier invoices and stock would be checked. If she had not resigned, she would have been subject to disciplinary proceedings and may have been dismissed for gross misconduct.

77.13 Mr Hanson denied that he had "*discriminated against the claimant as she alleges or at all. [He had] simply sought to manage a poor performing employee and deal with a serious criminal act perpetrated on the business.*"

78. There is also a letter to the claimant in the bundle dated 19 June 2018, by which the first respondent requested from her repayment of £224 on the basis that a pair of glasses containing blue-light filtering photochromic lenses paid for by the first respondent in July 2017 did not fall within the definition of "*a special pair of spectacles for screen work*" contained in its health and safety policy (pages 104 to 105). The claimant maintained in cross-examination that the first time she had seen that letter was during disclosure as part of these proceedings.

79. The first respondent issued and the claimant was served with proceedings in the county court for repayment of the cost of "*her own designer glasses*" (pages 111K to 114). That claim was eventually discontinued in November 2018 (page 150). Jonathan Hanson says that the case was abandoned because the first respondent was "*too busy to deal with it*". The claimant maintains that she found out that the county court claim had been discontinued only when she contacted the court directly to ask for guidance about the hearing. In cross-examination, Jonathan Hanson was unable to confirm whether any correspondence had in fact been sent directly to the claimant, but he assumed that the letters would have been sent out "*by normal post*".

The relevant law

<u>Unfair dismissal</u>

80. Section 95 of the Employment Rights Act 1996 (the ERA) states:

"(1) For the purposes of this part an employee is dismissed by his employer if …
—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct."

81. This is known as constructive dismissal. The case of **Western Excavating (ECC) v Sharp [1978] ICR 221** states that it is for the employee to prove on

the balance of probabilities that the employer committed a repudiatory breach of contract. A repudiatory breach means: "*a significant breach of contract going to the root of the contract which shows that the employer no longer intends to be bound by the essential terms of the contract*." The employee must then prove the employer's breach at least in part caused them to resign as a result and that they did not affirm the contract by delaying too long before resigning.

82. The case of **Malik & Another v BCCI [1997] ICR 606** confirms that there is an implied term in every contract of employment that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. A breach of this implied term is "*inevitably*" fundamental (**Morrow v Safeway Stores plc [2002] IRLR 9 EAT**).

83. In **Woods v W M Car Services (Peterborough) Limited [1981] IRLR 347**, the Court of Appeal explained:

    "To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and to determine whether it is such that its cumulative effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

84. A number of acts by an employer (in other words, a course of conduct) can, when considered as a whole, amount to a fundamental breach of contract. In this situation, an employee may resign following a "*last straw*" incident (**Lewis v Motorworld Garages Limited [1986] ICR 157**). Guidance on such cases, provided by the Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju [2005] IRLR 35**, can be summarised as follows:

    84.1 The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with earlier acts, contribute something to that breach and be more than utterly trivial.

    84.2 Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

    84.3 An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the employer's act as hurtful and destructive of their trust and confidence in the employer.

    84.4 The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It may not itself amount to a breach of contract. However, if the "final straw" consists of conduct which, when viewed objectively, is found to be reasonable and justifiable, it would unusual for an employment tribunal to find that it contributed to the undermining of the employee's trust and confidence in their employer.

85. In addition, there is no need for there to be any "*proximity in time or in nature*" between the last straw and any previous acts or omissions by the employer (**Logan v Commissioners of Customs and Excise [2004] ICR 1 CA**).

86. In **Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978** the Court of Appeal recently clarified that when considering whether an employee has been constructively dismissed as a result of cumulative or successive acts

or omissions, it is sufficient for a Tribunal to ask itself the following questions (paragraph 55):

86.1 What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered her or his resignation?

86.2 Has s/he affirmed the contract since the last act?

86.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

86.4 If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation. This is because if the Tribunal considers the employer's conduct as a whole to have been sufficiently serious and the final act to have been part of that conduct, it should not normally matter whether it amounted to a repudiatory breach at some earlier stage; even if it had and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive her or his right to do so.

86.5 Did the employee resign in response (or partly in response) to that breach?

87. If the Tribunal finds that an employee has been constructively dismissed, it must then consider whether that dismissal was unfair in accordance with section 98 of the ERA.

88. In this case, the first respondent does not seek to argue in the alternative that any dismissal found was fair. However, it invites the Tribunal to limit or reduce any award of compensation on a "*just and equitable*" basis (in accordance with section 123(1) of the ERA) in that the claimant would have been fairly dismissed at some point in any event.

Sex-related harassment

89. Section 40 of the EqA states:

"(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) who is an employee of A's."

90. Under section 26(1) of the EqA, a person (A) harasses another (B) if:

"(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

91. The list of "*relevant protected characteristics*" in section 26(5) EqA includes sex. Section 26(4) provides that, in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:

"(a) the perception of B;
(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

Direct sex discrimination

92. Sex is a protected characteristic under section 4 of the EqA. Section 13 of the EqA defines direct discrimination as follows:

"(1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

93. Section 39(2) of the EqA states:

"An employer (A) must not discriminate against an employee of A's (B) – …
(d) by subjecting B to any other detriment."

94. A "*detriment*" includes disadvantageous treatment, but does not include conduct which amounts to harassment (section 212(1) EqA). As a result, the Tribunal cannot find that the employee has been subjected to harassment and direct discrimination in respect of the same treatment.

95. To succeed in a claim for direct discrimination, the claimant must prove on the balance of probabilities that:

95.1 she was subjected to certain treatment;

95.2 she was treated less favourably than a comparator was or would have been treated in the same circumstances or in circumstances that were not materially different, and

95.3 in the absence of any explanation by the respondent, that the less favourable treatment was because of her sex, or otherwise such that the Tribunal could draw an inference that the treatment was tainted with discrimination.

96. Less favourable treatment must be established by reference to an actual or hypothetical comparator. According to section 23 of the EqA, on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case. However, even if such treatment did occur, it does not automatically follow that, on the face of it, discrimination also took place. The claimant must also show that she was treated the way in which she was because of the protected characteristic – **Zafar v Glasgow City Council [1988] IRLR 36 HL.**

97. In the alternative, the Tribunal may simply ask why the claimant was treated in the way that she was. If at least part of the reason was the claimant's sex, then it is likely that a comparator would have been treated differently and discrimination will be made out – **Shamoon v CC of the Royal Ulster Constabulary [2003] IRLR 285 HL; Aylott v. Stockton on Tees Borough Council [2010] IRLR 994 CA**

98. In determining whether the claimant has discharged the burden of proving her case, the Tribunal is entitled to consider all of the evidence put forward by the parties. In this respect, the claimant must prove something more than a difference in status (in this case, sex) and a difference in treatment for the burden to shift (**Madarassy v Nomura International plc [2007] IRLR 246 CA**).

99. If the claimant discharges the burden, the Tribunal must hold that discrimination took place unless the respondent can prove that it did not contravene the EqA (section 136).

Indirect sex discrimination

100. Section 19 of the EqA provides:

"(*1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

101. Section 19(3) states that "*sex*" is a relevant protected characteristic. The requirements of section 23 EqA also apply in order to determine whether female employees have been or would be placed at a particular disadvantage by any PCP compared to their male counterparts.

Conclusion

102. The claimant and respondents' representative made a number of oral submissions on the final day of the hearing. We have considered their submissions and responses with care, but do not repeat them in full. Accordingly, we summarise their submissions below where appropriate. We now apply the law to our findings of relevant facts in order to determine the issues in the claims as determined at the beginning of the hearing.

Unfair dismissal

103. The first issue is whether there was a fundamental breach of contract by the first respondent. The claimant argues that the first respondent was in breach of the implied term that it would not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. She relies on the behaviour and actions of Jonathan Hanson during meetings on 4 and 18 May 2018. We assess this specific issue bearing in mind our findings as to Mr Hanson's behaviour towards the claimant and his staff generally.

104. The most recent act on the part of the first respondent which the claimant says caused or triggered her resignation was the behaviour and actions of Jonathan Hanson during the meeting on 18 May 2018. The Tribunal is satisfied that the claimant did not affirm her contract following that meeting. Although she carried on working until Friday lunchtime, she explained in cross-examination that she sent a text to her partner to ask him to meet her and take her home because she was feeling very shaken. In view of our findings, we accept that the claimant routinely had to "pull herself together" following exchanges with Mr Hanson. She also made it clear that she did not agree with his actions and had made commitments she could not change without disappointing her son and losing the money she had paid for their holiday. The Tribunal accepts that she considered her position over the weekend, drafted her resignation letter and sent it first thing on Monday morning. She also went to see her doctor when it was suggested that her employment would

nevertheless continue and she could be required to attend a further meeting with Jonathan Hanson. In the circumstances, the Tribunal finds that the claimant did not delay too long in resigning following her meeting with Mr Hanson on 18 May 2018, or otherwise affirm her contract.

105. The next question is whether the events in question on 18 May 2018 were, by themselves, a repudiatory breach of contract. We are satisfied that they were. The Tribunal has found that Mr Hanson not only chose to revoke the claimant's arranged parental leave on two weeks' notice, having only very recently confirmed that she could take the time off as arranged, but also spoke to her in an unacceptable manner. We find that the claimant was likely to have lost all trust and confidence in her employer as a result, not only by the fact that Mr Hanson had effectively reneged on an apology and confirmation that she could take her leave following his previous behaviour, but that her plans to spend time with her son had once again been undermined when she had taken great care to book parental leave as early as possible. Mr Hanson also improperly questioned her family and personal arrangements.

106. Based on our findings, the Tribunal further accepts that the claimant was a hardworking and dedicated employee (demonstrated by her progression during her employment and the flexibility she showed during her parental leave in April 2018), and is likely to have felt humiliated by Jonathan Hanson's conclusion that she was not committed and would be "*easy*" to dismiss. Although the Tribunal accepts that Mr Hanson was dealing with a serious financial crisis, we are satisfied he did not have reasonable or proper cause for acting in the way that we have found.

107. Further and separately, although Jonathan Hanson says that he was unaware of the application of the Regulations on the basis that the parental leave policy was non-contractual, the Tribunal finds that the first respondent acted in breach of the Regulations in seeking to prevent the claimant from taking agreed leave. The time within which it could have validly postponed the claimant's leave had passed, and no alternate date(s) were given to her. Although a breach of the Regulations is not the complaint before us, in this context we ask ourselves whether the first respondent had reasonable and proper cause for seeking to prevent the claimant from taking agreed parental leave.

108. First, in evidence Jonathan Hanson criticised the claimant and during the hearing she was questioned on the basis that she was effectively using parental leave as additional holiday. The Tribunal is not persuaded by that contention.

109. The claimant and her partner have no relatives living in the UK. Both work full time and must try to cover their son's school holidays which amount to 13 weeks per year. In the Tribunal's judgment, the claimant quite properly booked annual leave to attend a personal commitment in Poland. The claimant says it was the first time in 6 years that she had accordingly requested unpaid parental leave in respect of her son's school holidays. We also see no force in the argument that the claimant should be criticised on the basis that her partner had later in the year also been granted time off in June, and they had paid for a holiday to be able to spend time together as a family.

110. Secondly, the Tribunal finds that at the time the reason given to the claimant for cancelling her parental leave was that Jonathan Hanson needed her assistance generally, and the claimant's evidence supports this finding (quoted in emphasis at paragraphs 63 and 64 above). In responding to the claimant's grievance, Mr Hanson thereafter stated the reason also to be "*because of the*

numerous performance issues" he had discovered. In his evidence, he initially cited a number of issues. Nevertheless, in specifically addressing the claimant's complaint of constructive dismissal Mr Hanson says that he did not withdraw the claimant's parental leave "*for any reason other than I needed her assistance to help with the stock check*". Earlier in his evidence, he also maintained that he needed the claimant "*to physically do the stock check*" required by Barclays. Andrea Olsson also explained to the Tribunal that she understood that the claimant needed to be present for "*the stock take … at the request of the bank*", but could not say with any certainty at whose specific request, why or when this stock check was due to take place.

111. During the hearing, the Tribunal attempted on a number of occasions to clarify with Jonathan Hanson when and why the stock take referred to in his evidence was due to take place. We find that his replies were not particularly persuasive on this matter, particularly when assessed against the contemporaneous documentation before the Tribunal. Our starting point is that it was initially put to the claimant in cross-examination that the stock take was to take place at the end of May. Indeed, the claimant confirmed that the first respondent routinely compiled its inventory on this basis, and Mr Hanson told us that the first respondent's year-end stock take took place at the end of June. When the claimant pointed out in cross-examination that her absence at the beginning June would therefore not affect matters, it was thereafter put to her that the stock check had to take place at the beginning of June. At that point, the claimant also said that if she was off sick, for example, the stock controller would stand in for her. In her view there were three people in her team "*who could assist – they knew everything I knew".*

112. The Tribunal accepts that representatives from Barclays visited the first respondent from 21 to 23 May 2018 (when the claimant would otherwise have been in work) to review the existing stock figures relating to April 2018 and selectively check certain stock lines (summarised at paragraph 41 above). However, the only document in the bundle supporting Jonathan Hanson's assertion that Barclays also required a full stock check following its initial visit comprised an undated inventory question sheet (pages 72C to 72E). In response to the Tribunal's questions Mr Hanson stated that "*there would have been emails*" to this effect, but they were not in the bundle. In the event, Mr Hanson went on to explain that the full stock check never took place because after its initial visit Barclays decided not to progress the first respondent's application any further.

113. In response to the Tribunal's questions, Jonathan Hanson expanded upon his written evidence by maintaining that KPMG also required a full physical stock check. However, he acknowledged that once again there were no supporting documents to this effect before the Tribunal. He also stated that at some point after the claimant's eventual resignation he obtained a postponement of this inventory following the discovery of evidence which showed that the former finance manager had fraudulently obtained payments from the first respondent. The year-end stock check thereafter took place in any event at the end of June 2018. In cross-examination, Mr Hanson told the claimant that she "*may or may not have participated*" in Barclays' or KPMG's review. At the end of the hearing, it was then submitted on the first respondent's behalf that had she not resigned it is likely that the claimant would have been able to take her parental leave in June 2018 in any event.

114. In all the circumstances, the Tribunal was not persuaded by the first respondent's evidence in this respect. Most importantly, if an impending and

particular stock check was at least an operative reason for cancelling the claimants' parental leave, we would have expected not only to have seen supporting documents in the bundle but also the first respondent's witnesses to have been more precise about this matter. As a result, although the first respondent submitted that the claimant was told about the stock check "*at the earliest opportunity*", based on evidence before us the Tribunal is unable to identify with any precision when it was due to happen and why, and when Jonathan Hanson would have learned that this was the case. In cross-examination, Mr Hanson also suggested to the claimant that she had not even been told about Barclay's pending initial visit because she "*had been on holiday a lot*".

115. Based on the letter that he gave to the claimant at the time, and the claimant's recollection of what was said, the Tribunal therefore finds it most likely that Jonathan Hanson simply decided that the claimant should be in work at the beginning of June 2018 owing to the general fall-out from the actions of the former finance manager. We are therefore not persuaded that the first respondent had reasonable and proper cause for cancelling outright the claimant's agreed parental leave when it did, particularly as she had shown flexibility when she had taken time off before and there was some uncertainty as to whether the claimant's participation in the ongoing audits was in fact essential.

116. Further and separately, if the Tribunal had not been persuaded that the allegations as found to have taken place on 18 May 2018 did not in themselves amount to a repudiatory breach, we are satisfied that the allegations in their entirety amounted to such. On 4 May 2018 we have found that Mr Hanson improperly shouted at the claimant and threatened to demote her if she did not come into work. Although Mr Hanson apologised subsequently and confirmed that the claimant could take her parental leave as planned, his behaviour and actions at the later meeting were sufficient to revive her right to resign. We have considered the first respondent's conduct as a whole and have determined that its cumulative effect, judged reasonably and sensibly, is such that the claimant could not have been expected to put up with it.

117. The next issue is whether the first respondent's breach caused the claimant to resign. The Tribunal's task in this respect is to determine whether the breach was <u>an</u> effective cause of the claimant's resignation (although not necessarily the only cause). It is for the Tribunal to determine, as a matter of fact, whether or not the employee resigned at least partly in response to the employer's breach rather than entirely for some other reason (**Jones v F Sirl and Son (Furnishers) Ltd 1997 IRLR 493 EAT; Nottingham County Council v Meikle [2005] ICR 1 CA; Wright v North Ayrshire Council UKEATS/0017/13)**.

118. In the circumstances, the Tribunal finds that the first respondent's repudiatory conduct was an effective reason for the claimant terminating her employment Most importantly, the claimant stated at the time that she was leaving primarily because of the Jonathan Hanson behaviour, but also because she doubted that her attendance at work at the beginning of June 2018 was as essential as Jonathan Hanson had suggested.

119. In addition, during cross-examination the claimant said that she chose to resign when she did because she "*did not want to get into trouble*". The first respondent contends that this shows that her prime motivation was to avoid a disciplinary investigation. The Tribunal disagrees with that contention. The claimant had been warned on her final day in work that Jonathan Hanson was

effectively "on the warpath". She understood that he was looking for someone to blame, and he had very recently questioned her commitment and integrity. The claimant's fears were borne out by, among other things, Mr Hanson's statement in response to her grievance, in which he suggested that there may be a criminal case to answer. Nevertheless, over the weekend before she resigned, the claimant had provided a timely and (as it turned out) credible answer to Mr Hanson's fuel purchasing query. The Tribunal's is satisfied on balance that it was fear rather than guilt which contributed to the claimant's decision to resign.

120. The Tribunal therefore finds that the claimant was dismissed by the first respondent in accordance with section 95(1)(c) of the ERA, in which case the claimant's claim for constructive unfair dismissal succeeds.

121. We therefore next consider whether it would just and equitable to limit or reduce the claimant's compensation on the basis that she would have been dismissed at some point in any event. The burden of proof is on the respondent in this respect. In such cases, it is not invariably just and equitable to reduce compensation if there is any suggestion of misconduct. Although we must ask ourselves what would have happened once any allegations came to the first respondent's attention, the Tribunal must approach the issue on the basis of whether a later dismissal would have been fair or unfair. To this end, we must bear in mind the statutory test for establishing the reasonableness of any decision to dismiss set out in section 98(4) of the ERA.

122. In analysing the first respondent's evidence and contentions on this issue, we took into account the following matters. First, based on our previous analysis of the credibility of the claimant and the respondents' witnesses, we generally preferred the claimant's evidence relating to this issue. Most importantly, we kept in mind that Jonathan Hanson readily confirmed in cross-examination that it remained his opinion (as stated in his acknowledgement of the claimant's resignation) that she had been a trusted and valued member of staff. It was also put to the claimant in cross-examination that she was "*the best person to oversee the stock take because she had been doing her job successfully for some time*". However, by way of its witness and documentary evidence, the first respondent attempted to paint a bleak picture of the claimant. As we have explained, Jonathan Hanson variously described her as a liar, unethical, incompetent and accused her of "*assisting [the former finance manager] in his ability to commit fraud*".

123. Secondly, we note that this issue had been initially defined on the basis that the claimant would have been fairly dismissed for either capability or conduct. The first respondent's witnesses thereafter presented a range of opinions. In his response to the claimant's grievance, Jonathan Hanson suggested If she had not resigned she might have been dismissed for gross misconduct. In evidence, Mr Hanson variously stated that before her dismissal it became apparent that the claimant "*was failing to do her job properly*" and "*significant performance issues had come to light*". In any event, he says that if she had not resigned, she would have been dismissed for ordering "*specialist lenses*" at the first respondent's expense and accepting a blender for effectively over-ordering from Lyreco in March 2018 in breach of the first respondent's bribery policy. Most importantly, Mr Hanson stated: "*Had she not resigned, given the seriousness of these issues I would have disciplined the claimant <u>and in the absence of a reasonable explanation</u> she is likely to have been dismissed* (emphasis added)*."* Finally in re-examination, Mr Hanson also stated that the claimant would have been dismissed for "*enabling [the finance manager] to get*

away with fraud since August 2017 and not following due process … he was very clever in the way that he adopted the claimant's weaknesses in the way that she was doing her job".

124. In evidence, Andrea Olsson stated that although by not doing her job properly the claimant was costing the first respondent "*more money than necessary*", she would "*almost certainly*" have been disciplined for accepting the blender and "*probably*" dismissed. At the end of the hearing, it was submitted on the first respondent's behalf that the claimant's failure to follow its audit trail made it easier for the financial manager to perpetrate fraud, and she had spent over £200 of its money on her glasses. It therefore argues that the claimant would have been disciplined for "*helping herself to company money*" and dismissed within two weeks of her resignation.

125. We have explained that the issue before the Tribunal is whether the claimant would have been fairly dismissed at some point. Generally, we therefore take into account our findings that prior to the claimant's resignation Jonathan Hanson suggested to the claimant that he might take away aspects of her role as general manager. Indeed just before the claimant resigned, he was in the process of canvassing the transport administrator's interest in assuming responsibility for purchasing, and had instructed the same employee effectively to bypass the claimant and report directly to himself or Andrea Olsson in respect of certain matters. Mr Hanson further suggested that the claimant would be first in line to be made redundant if the first respondent's financial situation meant that it was obliged to dismiss any employees for that reason. In terms of any issues to do with the way in which the claimant was doing her job, however, Jonathan Hanson insisted to the Tribunal that he did not suggest that she would be placed on a formal performance management programme. We also note that, according to the first respondent's disciplinary policy, "*unsatisfactory performance*" would be dealt with by way of progressive warnings and specified periods for improvement (page 39).

126. More specifically (and including the allegations contained in Jonathan Hanson's evidence as summarised above at paragraph 77), we conclude from the evidence:

126.1 The first respondent's bribery policy states that Jonathan Hanson's permission must be obtained before accepting any "*gifts*" (page 41). Two free blenders were included in orders placed with Lyreco in March 2018. Although Mr Hanson suspects that the claimant ordered "*extra material*" to obtain a blender for herself, the claimant maintained in cross-examination that these orders were based on previous stock takes. The claimant further stated that she left both blenders in the stock room, as she understood was the usual practice. Staff would then ask for and take what they wanted. Both blenders were there for "*some time*" and, therefore, the claimant eventually took one home. Mr Hanson confirmed in evidence that gifts from suppliers were "*pooled*" between employees. The Tribunal was not told what happened to the other blender, or whether any disciplinary action was taken against the person who claimed it.

126.2 It was not explained to the Tribunal on what basis the lenses obtained by the claimant did not fall within the definition of the first respondent's health and safety policy. Based on the claimant's credibility, we also accept her evidence that she did not receive correspondence from the first respondent in this respect other than notice of the county court proceedings. We also accept that this was the second such pair of glasses she had

obtained during her employment, and according to the first respondent's procedures it was invoiced for the lenses (not the designer frames) directly by the optician. Jonathan Hanson duly authorised the purchase of both pairs of lenses. Although the first respondent contended that there was no supporting paperwork, during submissions the claimant directed us to an invoice dated July 2017 for supplying and fitting the lenses into the frames that she had paid for (page 105).

126.3 The claimant insists that she did not demonstrate a "*flagrant disregard*" for company procedures or "*allow*" the finance manager to pay invoices without checks or authorisation. All invoice payments required a purchase and packing order to be passed to Jonathan Hanson for approval. The claimant maintains that relating to invoicing, purchasing, company expenditure and audit trails, she created and signed off the required paperwork, which was accordingly approved by Mr Hanson. She would double-check everything, no concerns were ever raised with her in this respect, and sample invoices which appeared in the bundle would not have been paid without an attached packing order and purchase order approved by Mr Hanson (pages 155 to 158). Among other things, Mr Hanson acknowledged to the Tribunal that he also shared responsibility (including as the former finance manager's line manager) in terms of what had happened. The finance manager had also been able to extend the first respondent's invoice financing limit without his knowledge.

126.4 The first respondent alleged that its transport log had not been completed since October 2017 (pages 76B and 76C), but at the time the claimant understood that the log was being updated on daily basis.

126.5 In terms of the use of more expensive suppliers, the first respondent cites a shipment to India in April 2018 as an example (pages 65 to 66). The claimant explained in cross-examination that she was on parental leave at the time. On her return, she pointed out that the first respondent could have used a cheaper transport company, but Mr Hanson told her that the decision had already been made. Mr Hanson also suggested that the claimant had delayed in changing another supplier until February 2018, but the claimant says that she kept Mr Hanson informed throughout that period whilst she negotiated the change.

126.6 We have found that the claimant did not lie to Mr Hanson about never having seen the first respondent's 2016 terms and conditions, but simply explained that she could not explain why the most recent version was not being used.

126.7 We have found that the claimant did not fail to update the salary details of the three employees who had passed their probation period as alleged.

126.8 The claimant and finance manager both denied using the company credit card for their own purchases, hence it was cancelled. The claimant suggestion regarding the petrol-station spending showed that the finance manager was most likely responsible. Jonathan Hanson told the Tribunal that because he was unable to "*prove anything*", he could take this issue no further.

126.9 The claimant denies that she deleted all of her emails before she resigned. Although the first respondent indicated at the time that it "*can and will recover*" the emails, the Tribunal was provided with no evidence as to

what (if anything) was retrieved in this respect. The first respondent also maintained that the claimant had never used her company laptop, but the claimant explained that she would log on to and work from the first respondent's server. She saved nothing on to her laptop.

127. In the absence of any other evidence, in the circumstances we find it most likely that the claimant might have been unfairly blamed for the position in which the first respondent found itself, and aspects her job are likely to have been taken away from her without proper consultation. However, on balance the Tribunal is satisfied that, following a reasonable investigation, it would not have been open to a reasonable employer to dismiss the claimant for the first respondent's cited reasons within any specified period of time. There may have been lessons to learn by everyone, but it would not have been reasonable to single out the claimant on this basis.

<u>Sex-related harassment</u>

128. To succeed in a claim for harassment, the claimant must prove, on the balance of probabilities, the following necessary elements (as defined in the case of **Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT**) are:

128.1 The respondent(s) engaged in unwanted conduct.

128.2 The conduct in question either (a) had the purpose or (b) the effect of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her.

128.3 The conduct was on a prohibited ground – that is to say, related to sex.

129. There may be an overlap between the questions that arise in respect of each element. For example, whether the conduct was "*unwanted*" will overlap with whether it created an adverse environment for the claimant or violated her dignity. In accordance with section 26(4) EqA, it is also for the Tribunal to decide the context within which the acts complained of took place.

130. The timing of any objection also has evidential importance. It may mean that an individual complaining after the event did not in fact perceive the conduct as having the relevant offensive qualities. However, the fact that there has been no immediate complaint cannot prevent a complaint being justified (**Weeks v Newham College of FE [2012] EqLR 788 EAT**).

131. Based on our findings of fact as to what happened in the meetings of 4 and 18 May 2018, we are satisfied that Jonathan Hanson subjected the claimant to the conduct as summarised at paragraphs 11.1.1 to 11.1.4 above. We are further satisfied that such conduct was unwanted by the claimant. Although we have found, based on the evidence of Juanita Woodward, that that the claimant had put up with Mr Hanson routinely raising his voice in meetings and otherwise humiliating her in front of her colleagues in terms of her understanding of English, it does not necessarily follow that the conduct in question was not unwanted.

132. As a Tribunal, we are aware that there are situations where employees may endure unwanted conduct which violates their personal of professional dignity because they are constrained by various circumstances. Most importantly, in terms of the allegations before us, the claimant had shown loyalty and commitment (demonstrated by her progression throughout her employment and Jonathan Hanson's acknowledgement after she had resigned), as well as flexibility in working from home particularly during her parental leave in April

2018. We have no doubt that it would have been difficult for the claimant and her partner in their particular circumstances to manage the care of and time with their son during his school holidays. As a result, we have no hesitation in concluding that the conduct in question was unwanted.

133. We next considered whether the conduct in question either had the purpose or the effect of either violating the claimant's dignity or creating an adverse environment for her. We have found that the claimant was shouted at 4 May 2018 in front of a colleague, threatened with demotion or dismissal, and thereafter on 18 May 2018 was obliged to endure further criticism of her professional integrity and personal on the basis that she was maintaining a legal right to take parental leave. In the circumstances, we are satisfied that these incidents amounted to the culmination of a campaign of unpleasant conduct designed to humiliate the claimant, and that purpose was achieved because the claimant was (as she described) "*devastated*".

134. Further and separately, if we had not been persuaded that Jonathan Hanson's conduct did not have the required purpose, we would have been satisfied that it had the required effect. In terms of the claimant's perception and other circumstances, she was not hypersensitive in that she had previously endured (among other things) Jonathan Hanson ridiculing her grasp of English in front of colleagues, some of whom she managed. Most importantly, it was also reasonable for the claimant to have been particularly upset by the comments about her personal circumstances because of the difficulties she faced in having no family or other support living nearby.

135. We next considered whether the conduct in question was related to the claimant's sex. At this point we deal with the respondents' submission in respect of an apparent concession made by the claimant during cross-examination that the respondents' decision to cancel her parental leave had nothing to do with her gender. The Tribunal's note is that the claimant conceded that the reason given to her by Jonathan Hanson at the time had nothing to do with her sex. In our view, this concession is not fatal generally to the claimant's complaints of sex discrimination.

136. It is the alleged discriminator's conduct which must be related to the protected characteristic. In the circumstances, we find on balance that the proven allegation at 11.1.2 above was related to the claimant's sex in Mr Hanson's suggestion that the claimant was effectively inefficient in organising her personal life compared to his wife. As a consequence, we find that this opinion played a part in Mr Hanson's decision to cancel the claimant's parental leave. This was because he was unimpressed by the claimant's ability to organise herself as a mother, which was related to her sex.

137. We were otherwise not persuaded that the proven allegations at paragraphs 11.1.1 and 11.1.4 were related to the claimant's sex. In the first instance, we find on balance that Mr Hanson was simply irritated by the claimant taking time off. Similarly, the evidence before us does not suggest that the accusation that the claimant was working insufficient hours outside of the office was related to the fact that she was a mother, or otherwise related to her sex.

138. In the circumstances, we are therefore satisfied that the claimant's complaint of harassment in respect of the allegations set out at paragraphs 11.1.2 and 11.1.3 above succeed. The remainder of her complaints of sex-related harassment fail and should be dismissed.

Direct sex discrimination

139. We next consider whether, in the alternative, any treatment not found to have been harassment was detrimental treatment falling within section 39(2)(d) of the EqA.

140. The treatment in question comprises general bullying behaviour, a threat of demotion or dismissal, and criticising the claimant's work ethic. In the circumstances, we find that such treatment amounted to a detrimental treatment (that is to say, it was disadvantageous to the claimant).

141. We must next consider whether respondent(s) treated the claimant less favourably than they would have treated a male general manager in the same or similar circumstances. The claimant contends that Jonathan Hanson regarded women as weak compared to men and "*took advantage of this*".

142. We have accepted Juanita Woodward's evidence that she witnessed Jonathan Hanson routinely humiliate staff. Ms Woodward made no distinction in her evidence between Mr Hanson's treatment of male and female employees in this respect. Moreover, she recalled one particular incident involving Mr Hanson shouting at a male employee for apparently performing below standard. In the circumstances, we are satisfied that Mr Hanson was as likely to behave in a similar way towards a male general manager. Moreover, even if we had found less favourable treatment, we would have gone on to consider whether such treatment was because of the claimant's sex. We would also have found that it was not for the same reason.

143. In the circumstances, the Tribunal finds that the claimant's complaint of direct sex discrimination in respect of the allegations at paragraphs 11.1.1 and 11.1.4 above therefore fails and should be dismissed.

<u>Indirect sex discrimination</u>

144. We next considered whether the respondent(s) applied a PCP generally, namely that employees forgo parental leave at short notice if required. In the absence of any other evidence, we accept (as did the claimant during the hearing) that the act complained of comprised a one-off decision taken by Jonathan Hanson for the reasons stated above, which was nevertheless tainted by sex-related harassment.

145. The Tribunal therefore concludes that the claimant's complaint of indirect discrimination fails and should be dismissed.

Employment Judge Licorish

Date: 2 May 2019